

No. 10355

United States
Circuit Court of Appeals
For the Ninth Circuit.

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation,
Appellant,
vs.

JOHN C. GRAY, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the Pacific Compensation District,
and LELAND T. McCLEES,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

FEB 26 1943

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer of John C. Gray, Deputy Commissioner	22
Appeal:	
Certificate of Clerk to Transcript of Record on	101
Cost Bond on	98
Designation of Parts of Record Necessary for Consideration on, Appellant's (CCA)	105
Notice of	97
Statement of Points to be Relied Upon on, Appellant's (CCA)	103
Stipulation as to Record on	99
Certificate of Clerk to Statement.....	3
Certificate of Clerk to Transcript of Record on Appeal	101
Clerk's Statement	2
Complaint	5
Cost Bond on Appeal.....	98
Designation of Parts of Record Necessary for Consideration on Appeal, Appellant's (CCA)	105

	Index	Page
Exhibits:		
Answer of Employer.....		40
Copy of Award of Compensation.....		47
Employee's Claim for Compensation.....		42
Employer's Report		35
Letter of J. W. Cooper, M. D.....		45
Notice that Claim will be Controverted....		38
Transcript of Testimony before Deputy Commissioner		51
Findings and Conclusion.....		27
Judgment		96
Minutes of Court:		
Thursday, Oct. 8, 1942 (Hearing Motion to Dismiss)		93
Saturday, Oct. 24, 1942 (Hearing Motion to Dismiss)		94
Saturday, Nov. 7, 1942 (Hearing Motion for Default)		94
Monday, Nov. 16, 1942 (Hearing on Offer of Evidence)		95
Motion for Default and Affidavit of Clerk.....		25
Motion to Dismiss		20
Names and Addresses of Attorneys of Record.		1

Index	Page
Notice of Appeal.....	97
Reporter's Transcript	78
Statement of Points to be Relied Upon on Appeal, Appellant's (CCA)	103
Stipulation as to Record	99
Stipulation re John C. Gray.....	21
Summons	18
U. S. Marshal's Return.....	19

NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

For the Plaintiff, Liberty Mutual Insurance Com-
pany, and Contractors, Pacific Naval Air Bases:

ANDERSON, WRENN & JENKS

Bank of Hawaii Building
Honolulu, T. H.

For the Defendant, Andrew R. Schmitz (John C.
Gray)

ANGUS M. TAYLOR, JR.

United States Attorney
Federal Building
Honolulu, T. H. [1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the United States District Court for the
Territory of Hawaii

Civil No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al.,
Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner of
the United States Employees' Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, claimant,
Defendants.

CLERK'S STATEMENT

Time of Commencing Suit:

August 5, 1942—Complaint filed.

Names of Original Parties:

Liberty Mutual Insurance Company, and "Con-
tractors, Pacific Naval Air Bases", Plaintiffs;
Andrew R. Schmitz, and Leland T. McClees,
Defendants.

Dates of Filing Pleadings:

August 5, 1942—Complaint and Summons.

September 30, 1942—Motion to Dismiss.

October 31, 1942—Stipulation for Substitution of
Parties.

October 31, 1942—Answer of John C. Gray, Dep-
uty Commissioner.

November 4, 1942—Motion for Default and Affidavit of Clerk.

November 24, 1942—Findings and Conclusion.

December 29, 1942—Judgment.

Times When Proceedings Were Had:

October 8, 1942—Hearing on Motion to Dismiss.

October 24, 1942—Hearing on Motion to Dismiss.

November 7, 1942—Hearing on Motion for Default.

November 16, 1942—Hearing on Offer of Evidence. [2]

Proceedings in the above entitled matter were had before the Honorable Delbert E. Metzger, Judge, United States District Court, Territory of Hawaii.

Dates of Filing Appeal Documents:

January 2, 1943—Notice of Appeal to Circuit Court of Appeals.

January 2, 1943—Cost Bond.

January 2, 1943—Stipulation as to Record.

**CERTIFICATE OF CLERK TO THE
ABOVE STATEMENT**

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of com-

mencement of the above-entitled cause; the names of the original parties, the dates when the respective pleadings were filed; the times when proceedings were had; the name of the judge presiding, and the dates when appeal pleadings were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of January, A. D. 1943.

[Seal]

WM. F. THOMPSON, JR.

Clerk, United States District
Court, Territory of Hawaii.

[3]

In the District Court of the United States
for the Territory of Hawaii

Civil Action No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, and HAWAIIAN
DREDGING COMPANY, LIMITED, a
Hawaiian corporation, RAYMOND CON-
CRETE PILE COMPANY, a New Jersey cor-
poration, TURNER CONSTRUCTION COM-
PANY, a New York corporation, MORRISON-
KNUDSEN COMPANY, INC., a Delaware
corporation, J. H. POMEROY & CO., INC., a
Washington corporation, UTAL CONSTRUC-
TION COMPANY, a Utah corporation, W. A.
BECHTEL COMPANY, a California corpora-
tion, and JOHN E. BYRNE, of Dallas, Texas,
doing business as “Contractors, Pacific Naval
Air Bases”,

Plaintiffs,

v.

ANDREW R. SCHMITZ, Deputy Commissioner of
the United States Employees’ Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, Claimant,
Defendants.

COMPLAINT

To the Honorable the Presiding Judge of the Above
Entitled Court:

Come now Liberty Mutual Insurance Company, and Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Company, Inc., J. H. Pomeroy & Co., Inc., Utah Construction Company, W. A. Bechtel Company and John E. Byrne, plaintiffs above named, and complaining of Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation District, [5] and Leland T. McClees, defendants above named, allege and show unto this Honorable Court as follows:

I.

That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U.S.C.A., Secs. 1651-1654) (Defense Bases Act), and particularly by reason of Section 1653(b), reading as follows:

“(b) Judicial proceedings provided under sections 918 and 921 of Title 23 in respect to a compensation order made pursuant to sections 1651-1654 of this title shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs”;

that in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended (49 Stat. 921, 33 U.S.C.A., Sec. 921).

II.

That Liberty Mutual Insurance Company is and at all times mentioned herein was a Massachusetts corporation duly licensed to engage in and engaged in the insurance business in the Territory of Hawaii; that Hawaiian Dredging Company, Limited is a Hawaiian corporation; that Raymond Concrete Pile Company is a New Jersey corporation; that Turner Construction Company is a New York corporation; that Morrison-Knudsen Company, Inc., is a Delaware corporation; that J. H. Pomeroy & Co., Inc., is a Washington corporation; that Utah Construction Company is a Utah corporation; that W. A. Bechtel Company is [6] a California corporation; that John E. Byrne is an individual doing business at Dallas, Texas; that said corporations and said John E. Byrne are and at all times mentioned herein were associated in a joint venture for the prosecution of certain defense projects on the Island of Oahu and are commonly referred to and known as "Contractors, Pacific Naval Air Bases", and will be hereinafter referred to as "Contractors".

III.

That Andrew R. Schmitz, a citizen of the United States residing in Honolulu, City and County of

Honolulu, Territory of Hawaii, now is and at all times herein mentioned was Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, having offices at 407 Hawaiian Trust Building, said Honolulu; that Leland T. McClees is a resident of Honolulu aforesaid and is a claimant under said Defense Bases Act.

IV.

That said Contractors were, in the month of April, 1942, engaged in the prosecution of certain defense work at Kaneohe, Island of Oahu; that all workmen's compensation insurance in connection with said work at Kaneohe, including workmen's compensation under the so-called Defense Bases Act (55 Stat. 62, 342 U.S.C.A. 1651-1654) during the said month of April, 1942 was carried by the plaintiff Liberty Mutual Insurance Company.

V.

That in February, 1942, the Contractors employed said defendant Leland T. McClees as a truck driver at Kaneohe, which employment continued from on or about February 26, 1942 [7] until April 15, 1942; that as a part of said claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942.

VI.

That on or about April 15, 1942 claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a "hitch hiker" by automobile to Honolulu; that on April 16, 1942 claimant was supposed to report back to work at Kaneohe but that he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck enroute to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment.

VII.

That thereafter, to wit, on or about June 8, 1942, said claimant filed a claim with the defendant Andrew R. Schmitz as said Deputy Commissioner against said Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter, to wit, on June 11, 1942, a hearing was held in the offices of said Andrew R. Schmitz on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance

Company; that [8] the proceedings and testimony at said hearing are more particularly set forth in the transcript of testimony of said hearing which will be produced at the hearing hereof and which is incorporated herein by reference.

VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit "A" and incorporated in this Complaint by reference.

IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects: [9]

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that "such transportation to work from Honolulu was available for employees other than those who lived at the Contractors' Hotel if they wished to use it" and that claimant "was using a conveyance provided by the employer for such purposes" is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that the accident occurred off the employer's premises; that the claimant at the time he sustained said

injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be [10] summoned to answer this Complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deem equitable and just.

Dated: Honolulu, T. H., August 5th, 1942.

LIBERTY MUTUAL INSUR-
ANCE COMPANY

HAWAIIAN DREDGING COM-
PANY, LIMITED

RAYMOND CONCRETE PILE
COMPANY

TURNER CONSTRUCTION
COMPANY

MORRISON-KNUDSEN COM-
PANY, INC.

J. H. POMEROY & CO., INC.

UTAH CONSTRUCTION COM-
PANY

W. A. BECHTEL COMPANY

JOHN E. BYRNE,

Plaintiffs,

By ANDERSON, WRENN &
JENKS

By (s) J. P. RUSSELL

Their Attorneys

Territory of Hawaii,
City and County of Honolulu—ss.

John P. Russell, being first duly sworn, on oath deposes and says: That he is associated with Anderson, Wrenn & Jenks, counsel for the plaintiffs named in the foregoing Complaint; that as such he is authorized to make and does make this verification for and on behalf of said plaintiffs; that he has read the foregoing Complaint, and to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay.

(S) J. P. RUSSELL

Subscribed and sworn to before me this 5 day of August, 1942.

[Seal]

(s) SAMUEL KAALOA

Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1945. [11]

Official Correspondence Should be Addressed to the
Deputy Commissioner

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION

Longshoremen's and Harbor Workers'
Compensation Act

Commissioners
Jewell W. Swoffard
Chairman

Andrew F. Schmitz
Deputy Commis-
sioner

John M. Morin

In reply refer to

John J. Keegan

File No.....

Pacific District
407-408 Hawaiian Trust Building
Honolulu, T. H.

In the matter of the claim for compensation under
the Defense Bases Act.

LELAND T. McCLEES

Claimant

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES

Employer

LIBERTY MUTUAL INSURANCE COM-
PANY

Insurance Carrier

Compensation Order

AWARD OF COMPENSATION

Case No. DB-P-1-1834

Claim No. 176

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That Contractors, Pacific Naval Air Bases, is an association including Hawaiian Dredging Company, Ltd., Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Co., J. H. Pomeroy & Company, Inc., W. A. Bechtel Company, Utah Construction Company, and John E. Byrne doing business as Byrne Organization, and that this association conducts its business under the name of Contractors, PNAB;

That on April 17, 1942, the claimant herein was in the employ of the employer above named on Nuuanu Avenue, 100 yards before the Country Club Road in the Territory of Hawaii, in the Pacific Compensation District, established under the provisions of the Act approved August 16, 1941, (Public Law No. 208, 77th Congress); and that liability of the employer was insured by the Liberty Mutual Insurance Company;

that on said date claimant herein was riding in a truck owned by the Honolulu Construction & Draying Company on his way to work when the truck was sideswiped by a dairy truck and claimant sustained an injury to the left arm; [12]

that claimant herein was employed at Kaneohe

and lived in the employees' camp in that location. However, on April 15, claimant came to Honolulu to visit a friend to and including April 16, 1942. On the morning of April 17, 1942, he waited for the truck which the employer furnished for the purpose of picking up employees who lived at the Contractors' Hotel in Honolulu, and who were so transported to work at Kaneohe. Such transportation to work from Honolulu was available for employees other than those who lived at the Contractors Hotel if they wished to use it. Claimant herein was in the course of returning to work after a holiday in Honolulu and was using a conveyance provided by the employer for such purposes. Therefore, the injury arose out of and in the course of his employment;

that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer;

that the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act;

that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$2828.80;

that as the result of the injury sustained the claimant has been wholly disabled since the date of the accident, April 17, 1942, and is entitled to compensation for such disability and during continuation of such disability;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

The employer, Contractors, Pacific Naval Air Bases, and its insurance carrier, Liberty Mutual Insurance Company, shall provide medical treatment, etc., in accordance with the said Act; and shall pay compensation to the claimant, Leland T. McCless, at the rate of \$25.00 per week, beginning April 17, 1942, for and during continuation of total disability; Provided, that if such total disability is followed by partial disability, temporary or permanent, this award may be modified in accordance with the terms of the Act.

Given under my hand at Honolulu, T. H. this 8th day of July, 1942.

(s) ANDREW F. SCHMITZ

Deputy Commissioner

Pacific District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

Leland T. McClees, Contractors' Hotel, Honolulu, T. H.

Contractors, PNAB, Box 2459, Honolulu, T. H.
Liberty Mutual Insurance Co., 315 A & B
Building, Honolulu, T. H.

(s) ANDREW F. SCHMITZ

Mailed July 13, 1942. [13]

[Title of District Court and Cause.]

SUMMONS

To the Above Named Defendants:

You are hereby summoned and required to serve upon John P. Russell, associated with Anderson, Wrenn & Jenks, plaintiffs' attorneys, whose address is Bank of Hawaii Building, Honolulu, T. H., an answer to the Complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] (s) WM. F. THOMPSON, JR.

Clerk of Court

Dated: Honolulu, T. H., August 5, 1942. [14]

Marshal's Civil Docket 7-329

No. 2379

Court No. 477

Fees \$9.44

Expenses 1.76

Total \$11.20

UNITED STATES MARSHAL'S RETURN

I hereby certify that on the 5th day of August, A. D. 1942, I received the within Summons at the City and County of Honolulu, Territory of Hawaii, in my district and that I personally served the same upon the following named defendants as follows: On August 5, 1942, upon Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, by exhibiting the original and leaving with him a certified copy of the summons and complaint; On August 6, 1942, upon Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District by exhibiting the original and leaving with him a certified copy of the summons and complaint and further on August 6, 1942, I mailed a certified copy of said summons and complaint by registered mail, addressed to Francis Biddle, Attorney General of the United States, Washington, D. C.; On August 7, 1942, upon Leland T. McClees at Mokapu, Oahu, T. H., by exhibiting the original and leaving with him a certified copy of the summons and complaint.

Dated at Honolulu, T. H. this 7th day of August, A. D. 1942.

OTTO F. HEINE,

U. S. Marshal, District of
Hawaii.

By (s) EMMANUEL U. MOSES, JR.
Deputy.

[Endorsed]: Filed Aug. 5, 1942. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now Andrew R. Schmitz, Defendant above named, by Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, and moves the Court to dismiss the Complaint herein upon the following grounds:

I.

That the facts alleged in said Complaint are insufficient to entitle Plaintiffs to the relief sought, or to any relief.

II.

That the facts alleged in said Complaint are insufficient to entitle Plaintiffs to a review by this Court of the proceedings before the Deputy Commissioner of the United States Employees' [17] Compensation Commission awarding compensation to Leland T. McClees, defendant above named.

III.

That it appears upon the face of the Complaint and the record of the proceedings and testimony at the hearing before said Deputy Commissioner, referred to and made a part of said Complaint, that the findings of fact made by said Defendant Andrew R. Schmitz are based upon substantial and competent evidence.

Wherefore, said Defendant prays that said Complaint herein may be dismissed.

Dated at Honolulu, Territory of Hawaii, this 30th day of September, 1942.

ANDREW R. SCHMITZ,

Deputy Commissioner of the
United States Employees'
Compensation Commission
for the Pacific Compensation
District,

By (s) ANGUS M. TAYLOR, JR.,

United States Attorney, District
of Hawaii.

His Attorney.

Receipt of a copy of the within Motion to Dismiss is hereby acknowledged this 30th day of September, 1942.

(s) J. P. RUSSELL for

ANDERSON, WRENN &
JENKS,

Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 30, 1942. [18]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the above-entitled parties, by their respective attorneys, that John C. Gray is now the duly qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, succeeding Andrew R. Schmitz, one

of the defendants above named, and that said John C. Gray may be substituted as a party defendant for the said Andrew R. Schmitz.

Dated at Honolulu, Territory of Hawaii, this 31 day of October, 1942.

(s) J. P. RUSSELL for
ANDERSON, WRENN &
JENKS,
Attorneys for Plaintiffs.

(s) ANGUS M. TAYLOR, JR.,
United States Attorney, Dis-
trict of Hawaii.
Attorney for Defendant
Deputy Commissioner.

[Endorsed]: Filed Oct. 31, 1942. [20]

[Title of District Court and Cause.]

ANSWER

The Defendant John C. Gray, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, by his attorney, Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, for his answer to the complaint herein:

I.

Admits each and every allegation in the paragraphs of the complaint marked and numbered I, II, III, IV and VII.

II.

Denies each and every allegation contained in paragraphs of the complaint marked and numbered V and IX.

III.

Admits that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck enroute to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in [22] said Honolulu, at a point approximately twelve miles from his place of employment, and denies each and every other allegation contained in paragraph marked and numbered VI of the complaint.

IV.

Admits that after said hearing said Andrew R. Schmitz made and entered an award of compensation to the said claimant Leland T. McClees, a copy of which award is attached to said complaint, marked Exhibit "A" and incorporated in the complaint by reference, but denies each and every other allegation contained in paragraph marked and numbered VIII of the complaint.

V.

Further answering the whole of said Complaint this defendant alleges that said award of compensation made by said Andrew R. Schmitz to Leland

T. McClees was made and entered fully in accordance with law;

That the transcript of the testimony and transaction had before said Deputy Commissioner and exhibits produced before said Deputy Commissioner amply, fully and completely justify the finding of said Deputy Commissioner and the award of compensation based thereon; and

That this Court has no other alternative under the law but to sustain the finding of the Deputy Commissioner and the award of compensation made and entered by said Deputy Commissioner.

Wherefore, defendant demands judgment against the plaintiffs dismissing the complaint herein, together with [23] the costs and disbursements of this action.

Dated at Honolulu, Territory of Hawaii, this 31st day of October, 1942.

(S) ANGUS M. TAYLOR, JR.,

United States Attorney, District of Hawaii.

Receipt is hereby acknowledged of a copy of the within Answer this 31st day of October, 1942.

(s) J. P. RUSSELL for

ANDERSON, WRENN &
JENKS

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 31, 1942. [24]

[Title of District Court and Cause.]

MOTION FOR DEFAULT

Come now Liberty Mutual Insurance Company, Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Company, Inc., J. H. Pomeroy & Co., Inc., Utah Construction Company, W. A. Bechtel Company and John E. Byrne, plaintiffs above named, by their attorneys, Anderson, Wrenn & Jenks, and respectfully move that an order of default be entered by this Honorable Court declaring the defendant Leland T. McClees in default for failure to answer or otherwise plead to the complaint herein.

This motion is based upon the record and files herein and upon the affidavit of William F. Thompson, Clerk of the United States District Court in and for the Territory of Hawaii, hereunto attached.

Dated: Honolulu, T. H., November 4th, 1942. [26]

LIBERTY MUTUAL INSUR-
ANCE COMPANY
HAWAIIAN DREDGING COM-
PANY, LIMITED
RAYMOND CONCRETE PILE
COMPANY
TURNER CONSTRUCTION
COMPANY
MORRISON-KNUDSEN COM-
PANY, INC.

J. H. POMEROY & CO., INC.
UTAH CONSTRUCTION COM-
PANY

W. A. BECHTEL COMPANY
JOHN E. BYRNE,

Plaintiffs,

By ANDERSON, WRENN &
JENKS,

Their Attorneys,

By /s/ J. P. RUSSELL

Receipt of a copy acknowledged this 5 day of
Nov. 1942.

/s/ ANGUS M. TAYLOR, JR.

[Endorsed]: Filed Nov. 4, 1942. [27]

Territory of Hawaii,
City and County of Honolulu—ss.

AFFIDAVIT

William F. Thompson, being first duly sworn, on oath deposes and says: That he is the Clerk of the United States District Court for the Territory of Hawaii and as such has custody of all records filed in said Court; that he has examined the records in the above entitled cause and that there is no answer or other pleading filed by Leland T. McClees, one of the defendants, in Civil 477, entitled "Liberty Mutual Insurance Company, a Massachusetts corporation, et al, plaintiffs, v. Andrew R. Schmitz and Leland T. McClees, defendants.

That it appears from the return of the United States Marshal herein that the defendant Leland T. McClees was duly served by personal service on August 7, 1942 and that the summons required the said defendant to answer to the complaint within sixty days after such service; that no appearance or continuance on behalf of said Leland T. McClees has been filed in this cause.

Further affiant sayeth not.

/s/ WM. F. THOMPSON, JR.

Subscribed and sworn to before me this 4th day of November, 1942.

/s/ THOS. P. CUMMINS

Deputy Clerk, United States District Court, Territory of Hawaii. [Seal] [28]

[Title of District Court and Cause.]

FINDINGS AND CONCLUSION

In this case it is the duty of the court to examine the findings and compensation award of the deputy commissioner, together with the evidence upon which his award is based, and determine whether the award is in accordance with law. This is the sole ultimate question before the court.

There is no dispute about the essential facts in the case:

The claimant began work for Contractors, Pacific Naval Air Bases in defense base construction in January, 1942; [30] at the time injury occurred, on

introduction in England and the United States. Likewise, the interpretation of such law, coming up from a basis of harsh common law rules as applied to the relations between master and servant, has developed to the view that the relation of an employer and employee is a somewhat abiding status and not merely an implied contract to perform certain hours of work of a certain kind at a certain place. [32] That is what the Supreme Court of the United States has said in the case of *Cudahy Co. vs. Parramore*, 263 US. 481. The exact words of the Supreme Court are as follows:

“Workmen’s Compensation Legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes the capital; one for the sake of wages and the other for the sake of profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a casual connection between the injury and the business in which he em-

plys the latter—a connection substantially contributory though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (*Mountain Timber Co. vs. Washington*, supra, P. 239) to escape condemnation as arbitrary, capricious or clearly unreasonable. Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case.”

The supreme courts of numerous states from the Atlantic to the Pacific have in late years said the same thing in substance, meaning that industries must bear the burden of caring for workmen injured in industry, whether the injury results directly from working operations or in the [33] general course of and incidental to their employment. This does not mean that an employer is an insurer of the safety of an employee from the time he leaves his private abode to enter upon his assigned work until he returns thereto after the day's work is ended, nor while the employee is otherwise away from his work and going about his own affairs,

but, when an employee, under the circumstances surrounding a case like the one under review, quits his private affairs, prepares himself to enter upon his day's work and starts on his way thereto, and in doing so avails himself of means of transportation to the site furnished by the employer as incidental to such employment, it is clear that the compensation law is then operative upon both the employer and employee.

The supreme court of Montana, in *Wirta vs. North Butte Milling Company*, 210 Pac 332, says:

“The word ‘employment’ as used in the Workmen’s Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities regardless of whether the employee is actually engaged doing the thing he was employed to do * * * To say that plaintiff ‘ceased’ working for the defendant is not equivalent to saying that he severed the relation of employer and employee.”

The supreme court of Oregon, in *Lamm vs. Silver Falls Timber Co.* (286 Pac 527, 530), a case in which the court made a most exhaustive and profound study and analysis of many important decisions of late years, said:

“Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant at a moment when he was not performing manual labor for his employer,

does not necessarily prove that the accident did [34] not arise out of or in the course of employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that injury must have been inflicted during regular working hours."

These general interpretations of compensation laws were established long before Congress made the Longshoremen's and Harbor Workers' Compensation Act applicable to persons employed at certain defense bases by the Act of August 16, 1941, 55 Stat. 622.

It is true that if we adopted the lines of reasoning in many earlier day cases it would be impossible to find that the injury in this case arose out of and in the course of employment, but the evolutions of time in better understanding of the purpose, scope and intent of compensation laws in their relation to industrial, economic and social conditions and affairs as affecting employer, employee and public interest, has given to these laws new and different interpretations which root deeper and broader than the views held in earlier cases.

In late years courts have found little difference between acts which read "out of and in the course of employment", and those reading, "out of or in the course of employment". They mean the same thing.

It is not believed that merely because some doctrines are more modern than others they are nearer justice and truth. But when a strong line of

later cases clearly show a definite trend dictated by sound reasoning and good conscience, indicative of universal benefit, we prefer to endorse and follow them, particularly when that is the mind of the United States Supreme Court, and we here hold (find) that upon the evidence and findings of the deputy commissioner, the compensation order did not violate any principle of law; [35] wherefore, in conclusion, the complaint is dismissed.

As a concluding note in this case we take occasion to say that this court joins in the rebuke so forcibly expressed recently by Judge Otis of the Federal Court of the Western District of Missouri with respect to the practice participated in principally by younger attorneys representing causes in behalf of the United States of America, in which they "demand" in their pleadings definite action on the part of the court, and then inform the court that it would be unsupportable and unthinkable that it not view the case in accordance with such demands.

There are many situations in which a litigant may properly demand of a court a thing which is a matter of clear and unquestioned right, but it is certainly unbecoming to demand action which in its nature should be based upon the discretion, wisdom or conscience of the court. Few things give quicker offense to a federal court than the implication that it wears a yoke of judicial servitude to the Government. Truly, a court owes much to the executive branch of the Government;

likewise it owes much to the legislative, but it owes much more to the judicial, and any demands of a dictatorial nature by an attorney representing an executive department, or a private litigant for that matter, should meet a sharp rebuke, for it must be remembered that all litigants stand before the court on an equal footing in their prayers for its decision.

Dated at Honolulu this 24th day of November, 1942.

(S) D. E. METZGER

Judge.

[Endorsed]: Filed Nov. 24, 1942. [36]

Form US-202

DB-P-1-1834

Claim 176

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Case No.

Insurance

Carrier's No.

United States Employees' Compensation
Commission

Office of Deputy Commissioner.....

Administering Longshoremen's and Harbor
Workers' Compensation Act

EMPLOYER'S FIRST REPORT TO DEPUTY
COMMISSIONER OF ACCIDENT OR OC-
CUPATIONAL DISEASE

(To be submitted in duplicate to Deputy Commissioner who will forward copy to Commission)

KA-529

Employer

1. Employer's name Contractors, Pacific Naval Air Bases (Individual or firm name).
2. Office address Pearl Harbor, Honolulu, T. H. (Street and number) (City or Town).
3. Nature of business Construction (Goods produced, work done, or kind of trade or transportation).
4. Insurance carrier..... 5. When was carrier notified? By this report.

Injured Person

6. Full name of injured person Leland T. McClees. His check No. 10933.
7. Address: Street and No. Contractors' Hotel. City or town Honolulu, T. H.
8. Sex Male. Age 28. Speak English? Yes. If not, what language?.....
9. Injured person's regular occupation Truck driver.
10. Was he injured in regular occupation? No. If not, occupation when injured On way to work.
11. Wages or average earnings per day, \$.....; month, \$225.00 (Include overtime, bonuses, etc.)
12. Working days per week 5½. Any other advantage? Mainland Contract Man.
13. Length of service in occupation 4 Months. Were full wages paid for day of injury? Yes until further notice.

The Injury

14. Place where injury occurred On Nuuanu Ave. 100 yds. before Country Club Rd. (Give place and name of vessel).
15. Name of foreman Mr. Hickey.
16. Date of accident or first illness April 17, 1942. (Month, day, year). Last day worked April 16, 1942 (Month, day, year).
17. When did you or your foreman first have knowledge of injury? Me on April 17, 1942.
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Injured person was on HC&D truck on way to work when the HC&D truck was side swiped by a Dairy truck which was proceeding to town. (Immediate cause of alleged injury or disease).
19. Machine, tool, or thing in connection with which accident or disease occurred Side of Truck (If machine, indicate part).

Nature and Extent of Injury

20. Nature of injury or occupational disease Injury to left arm (State exactly the part of the person affected and the character of injury or disease).
21. Was member or part of member lost? No.
22. Will injury probably result in serious head or facial disfigurement? No.
23. Did injury cause loss of time? Yes. If "yes", on what date? April 17, 1942 (Yes or no).
24. Has injured person returned to work? No. If "yes", on what date? (Yes or no)

25. Did you provide or authorize medical attention?
When? (Yes or no).
26. Physician Alsup Clinic (Name), 1154 Bishop
St. (Address).
27. Hospital St. Francis Hospital (Name), 2260
Liliha St. (Address).

Firm name Contractors, Pacific Naval Air Bases.

Dated April 21, 1942.

(Signed) GILBERT C. CHING,

First Aid Man.

(Official title).

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-211) must be made at the termination of disability, or at the end of fifteen days if disability had not then ended. [37]

Form US-207

DB-P-1-1834

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Case No.

Insurance

Carrier's No.

United States Employees' Compensation
Commission

Office of Deputy Commissioner

Administering Longshoremen's and Harbor
Workers' Compensation Act

NOTICE TO THE DEPUTY COMMISSIONER
THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to Commission)

Note.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer Hawaiian Dredging Co., Ltd., et al.
2. Office address: Street and No. P. O. Box 2459. City or town Honolulu.
3. Name of injured person Leland T. McClees.
4. Present address: Street and No. Contractors' Hotel. City or town Honolulu.
5. Date of alleged accident or first illness 4-17-42, 192....,M.
6. Nature of alleged accident or occupational disease injury to left arm.
7. When was notice of injury received from employer? 4-24-42, 192....
8. This case will be controverted for the following reasons:

- (a) For weekly wage?.....
- (b) For rate of compensation?.....
- (c) For period of disability?.....
- (d) If controverted for any other reason, state fully below:

Claimant was not in the course of his employment when injured and the accident did not arise out of his employment, and reserves the right to controvert for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? Yes (Yes or no).

Name of Insurance Carrier Liberty Mutual Insurance Company.

(Signed)

C. F. WHITE/ec

Official title, Resident Manager.

Dated 5-19-42. [38]

Form US-215

Leave This Space Blank

Case No.

Insurance

Carrier's No. C92-8574

United States Employees' Compensation
Commission

Office of Deputy Commissioner Pacific.

Administering Longshoremen's and Harbor
Workers' Compensation Act

ANSWER OF EMPLOYER OR INSURANCE
CARRIER TO EMPLOYEE'S CLAIM FOR
COMPENSATION

LELAND T. McCLEES,

Claimant,

vs.

HAWAIIAN DREDGING CO.,

Employer,

LIBERTY MUTUAL,

Insurance Carrier.

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is denied that notice of injury was given employer as specified in application.

6. It is denied that applicant was permanently disabled to the extent stated in application.

7. It is denied that applicant was temporarily disabled for the period stated in application.

8. It is denied that the rate of wages as set forth in application is correct.

(Signed) C. F. WHITE/ec
C. F. WHITE.

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim. [39]

Form US-203

Leave This Space Blank

Case No. DB-P-1-1834

Insurance

Carrier's No.

United States Employees' Compensation
CommissionOffice of Deputy Commissioner Pacific District.
Administering Longshoremen's and Harbor
Workers' Compensation Act

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

Injured Person

1. Name of employee Leland T. McClees. Employee's check No. 10933.
2. Address: Street and No. Box 83, Lanikai. City or town.
3. Sex Male. Age 28. Married, single, widowed Single.
4. Do you speak English? Yes. Nationality American.
5. State regular occupation Truck Driver.
6. What were you doing when injured? Riding in truck.
7. (a) Wages or average earnings per day, \$225.00 mo. (Include overtime, board, rent, and other allowances.) (b) Per week, \$..... (c) Were you employed elsewhere during week in which

you were injured? (d) If so, state
where and when

8. Were you paid full wages for day of accident?
Yes.

Employer

9. Employer Contractors, PNAB.
10. Office address: Street and No. Box 2459. City
or town Honolulu.
11. Nature of business Construction.

The Injury

12. Place where injury occurred On Nuuanu Ave.,
100 yds before Country Club Dr. (Give place,
and name of vessel).
13. Name of foreman Mr. Hickey.
14. Date of accident or first illness, the 17th day
of April, 1942, at 6:15 o'clock a. m.
15. How did accident happen or how was occupa-
tional disease caused? Was on HC & D truck
on way to work when the truck was sideswiped
by a dairy truck which was proceeding to town.

Nature and Extent of Injury

16. State fully nature of injury or occupational
disease: Compound fracture of left elbow.
17. On what date did you stop work because of in-
jury? Yes.
18. Have you returned to work? (Yes or No.) No.
If "yes," on what date?, 192....
19. Does injury keep you from work? (Yes or No.)
Yes.
20. Have you done any work in period of disabil-
ity? No.

21. Have you received any wages since injury? No.
If so, from and to what date?
22. Has injury resulted in amputation? No. If so,
describe same
23. Did you request your employer to provide med-
ical attendance? No. Has he done so? No.
24. Attending physician: Name Dr. Alsup & Dr.
Cooper. Address Honolulu.
25. Hospital: Name St. Francis Hospital. Address
2260 Liliha St.

Notice

26. Have you given your employer notice of injury? (Yes or No.) Yes. When? April 17, 1942.
27. If such notice was given, to whom? Truck driver (Mitchell) told employer.
28. Was it given orally or in writing? oral.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statements of facts.

(Signed by) **LELAND McCLEES,**
Claimant.

Mail address (mainland) K Cokato, Minn.

Dated June 8, 1942. [39A]

John W. Cooper, M.D.
Orthopaedic Surgery
353 Young Hotel Bldg.
Honolulu, Hawaii
Telephone 5318

June 10, 1942

Liberty Mutual Insurance Company
315 Alexander & Baldwin Building
Honolulu, T. H.

Re: Mr. Leland McClees, Emp. Kaneohe Naval Air Base, Kaneohe, Oahu.

Dear Sirs:

Since my last communication to you on May 19th, 1942, there has been a change of condition in Mr. McClees' case. Approximately a week after my letter was forwarded to you, Mr. McClees began to develop a pain in and about the left elbow which necessitated him being returned to surgery at St. Francis Hospital on May 27th. At this time it was found that there had developed a non-union of the fragments of the elbow joint and that there was some accumulation of purulent discharge. Furthermore the elbow, formerly without swelling, had become suddenly swollen and tender. On further exploration of the elbow at the time of second operation, it was found that some of the fragments failed to heal and had become necrotic, so were removed. The joint was then drained and the large skin defect was repaired by means of a skin plastic procedure.

Mr. McClees is once more up and about, and is beginning to use the left elbow again. The extreme fragmentation of the upper end of the ulnar bone may require a bone graft at some later date, however, this cannot be definitely established until a period of at least six months healing has been completed. It will be necessary to keep him at the hospital for an additional period of approximately one month, before discharging him to his home.

The skin plastic procedure at this time has healed quite satisfactorily, and as to disability, it may be found necessary to increase this to above 25%, however it is yet too early to make any such estimate at this time. On further questioning Mr. McClees regarding his travel, he insists that he was on his way to work and that he was injured during transit from Honolulu to his place of employment.

Hoping that this report may bring the progress of the injury to date, I remain,

Respectfully yours,

(s) JOHN W. COOPER, M.D.

JWC:lw [40]

In the matter of the claim for compensation under
the Defense Bases Act.

LELAND T. McCLEES,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES,

Employer

LIBERTY MUTUAL INSURANCE COMPANY
Insurance Carrier

Compensation Order

AWARD OF COMPENSATION

Case No. DB-P-1-1834

Claim No. 176

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That Contractors, Pacific Naval Air Bases, is an association including Hawaiian Dredging Company, Ltd., Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Co., J. H. Pomery & Company, Inc., W. A. Bechtel Company, Utah Construction Company, and John E.

Bryne doing business as Bryne Organization, and that this association conducts its business under the name of Contractors, PNAB;

That on April 17, 1942, the claimant herein was in the employ of the employer above named on Nuuanu Avenue, 100 yards before the Country Club Road in the Territory of Hawaii, in the Pacific Compensation District, established under the provisions of the Act approved August 16, 1941, (Public Law No. 208, 77th Congress); and that liability of the employer was insured by the Liberty Mutual Insurance Company;

That on said date claimant herein was riding in a truck owned by the Honolulu Construction & Draying Company on his way to work when the truck was sideswiped by a dairy truck and claimant sustained an injury to the left arm;

that claimant herein was employed at Kaneohe and lived in the employees' camp in that location. However, on April 15, claimant came to Honolulu [41] to visit a friend to and including April 16, 1942. On the morning of April 17, 1942, he waited for the truck which the employer furnished for the purpose of picking up employees who lived at the Contractors' Hotel in Honolulu, and who were so transported to work at Kaneohe. Such transportation to work from Honolulu was available for employees other than those who lived at the Contractors Hotel if they wished to use it. Claimant herein was in the course of returning to work after

a holiday in Honolulu and was using a conveyance provided by the employer for such purpose. Therefore, the injury arose out of and in the course of his employment;

that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer;

that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act;

that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$2828.80;

that as the result of the injury sustained the claimant has been wholly disabled since the date of the accident, April 17, 1942, and is entitled to compensation for such disability and during continuation of such disability;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

The employer, Contractors, Pacific Naval Air Bases, and its insurance carrier, Liberty Mutual Insurance Company, shall provide medical treatment, etc., in accordance with the said Act; and shall pay compensation to the claimant Leland T. McClees, at the rate of \$25.00 per week, beginning April 17, 1942, for and during continuation of total disability.

ity; Provided, that if such total disability is followed by partial disability, temporary or permanent, this award may be modified in accordance with the terms of the Act.

Given under my hand at Honolulu, T. H. this 8th day of July, 1942.

/s/ ANDREW R. SCHMITZ
Deputy Commissioner
Pacific District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier at the last known address of each as follows: [42]

Leland T. McClees, Contractors' Hotel,
Honolulu, T. H.

Contractors, PNAB, Box 2459, Honolulu,
T. H.

Liberty Mutual Insurance Co., 315 A & B
Building, Honolulu, T. H.

/s/ ANDREW R. SCHMITZ
Deputy Commissioner

Mailed July 13, 1942. [43]

United States Employees' Compensation Commission,
Before Andrew *F.* Schmitz, Deputy Commissioner,
Pacific District.

Case No.

LELAND T. McCLEES,

Claimant,

vs.

CONTRACTORS, PNAB, Employer, LIBERTY
MUTUAL INSURANCE COMPANY, Insurance Carrier,

Respondents.

TRANSCRIPT OF TESTIMONY AT
HEARING

Pursuant to notice and by stipulation this matter was heard before Andrew *F.* Schmitz, Deputy Commissioner, United States Employees' Compensation Commission, at Honolulu, T. H., on the 11th day of June, 1942, at 10 o'clock A.M.

Present:

Leland T. McClees, Claimant, in person;

C. F. White,

For Contractors, PNAB, Employer, and
Liberty Mutual Insurance Co., Insurance Carrier.

Reported by:

Carey S. Cowart,

Certified Shorthand Reporter,

Honolulu, Hawaii. [45*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

Comm. Schmitz: This is a claim for compensation under the Defense Bases Act by Leland T. McClees against Contractors, PNAB, for personal injury by accident arising out of and in the course of his employment April 17, 1942, when he was on an HC&D Company truck on the way to work; the truck was sideswiped by a dairy truck that was proceeding to town and as a result of this accident McClees sustained a compound fracture of the left elbow; he has been disabled from work since the date of the accident.

Present at this hearing are the claimant Leland T. McClees, and C. F. White, representing the employer and insurance carrier, Contractors, PNAB, and Liberty Mutual Insurance Company.

May we have your denials and admissions?

Mr. White: Yes.

Comm. Schmitz: Will you state your admissions and denials for the record, Mr. White?

Mr. White: The employer and insurer in answer to the claim for compensation show:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application;

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury, but it is admitted that the employment in which the employee was regularly engaged was subject to the Defense Bases Act. [46]

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the injury the employee was performing services growing out of and incidental to his employment.

5. It is admitted that notice of injury was given the employer, as specified in the application. In relation to that the employer's and insurer's answer on Form U.S. 215 should be corrected to show an admission rather than a denial.

6. It is denied that the applicant was permanently disabled to the extent stated in the application.

7. It is admitted that the applicant was temporarily disabled for the period stated in the application.

8. It is admitted that the rate of wages as set forth in the application is correct.

9. The employer and insurer contend that the employee was returning from a personal mission at the time the accident occurred.

That is all.

Comm. Schmitz: Mr. McClees, you filed this claim for compensation?

Mr. McClees: Yes.

Comm. Schmitz: You want the matter gone into to determine what compensation, if any, you are entitled to, is that it; fully gone into? [47]

Mr. McClees: Yes, sir.

Comm. Schmitz: Do you intend to sue the third party? Do you know what I mean?

Mr. White: The third party is either the HC&D, Hawaiian Construction and Draying Company, Ltd., the owner of the truck in which you were riding, and the operator also, and the dairy truck which collided with the HC&D truck and produced the injury.

Mr. McClees: Well, I don't know which carries insurance.

Mr. White: You have a common-law remedy against them. In other words, you can sue them.

Mr. McClees: The trucks are supposed to be insured, aren't they; they are hauling passengers.

Mr. White: If they were not insured you have the right to sue the corporation owners. Have you approached them at all on that?

Mr. McClees: I haven't seen them at all. Only the driver was up once, one day, that is all, but he didn't say anything about it.

Mr. White: You cannot do both. If you would like to receive compensation benefits——

Mr. McClees: The compensation doesn't include the hospital bills and that? I have to pay that out of the compensation? [48]

Mr. White: No. If you are awarded compensation you will also get your doctor and hospital bills paid, but you will lose your right then to go after the third party; your employer's insurance company will then become subrogated to your common-law rights against them.

Comm. Schmitz: Here is the situation, McClees. You were injured; you feel you were injured while in the course of your work and as a result of your work, and if that is so then you have a right under the Defense Bases compensation law to collect compensation as the law provides from the employer and insurance carrier. However, the law recognizes that such accidents might sometimes involve persons other than your employer. In your particular case you were working for Contractors, PNAB, and come within the scope of the Defense Bases jurisdiction. You were riding on a Honolulu Construction and Draying Company truck and you were injured because of the act of another owner's truck. So the question is: Do you want to come under the compensation law and take your compensation from your employer and its insurance carrier or is it your intention to eventually sue the Honolulu Construction and Draying Company and/or the dairy truck owner? You cannot do both.

Mr. McClees: I understand that.

Comm. Schmitz: If we dispose of this claim under the workmen's compensation law and you collect compensation under the Defense Bases compensation law, then your rights to go [49] after the Honolulu Construction and Draying Company or the dairy truck owner are lost to you, but they are turned over to Mr. White here representing the Liberty Mutual Insurance Company and Contractors, PNAB, and they in turn can go after these

people to recover damages on your behalf. Now the law further provides that if they do that, if they get more than what they are paying to you under this law, then they first deduct their reasonable expenses that they have incurred in that connection to recover but whatever is left over and above that is paid to you. So it is up to you to decide what you want to do. I presume that by filing this claim for compensation here that you decided that you wanted to take this step first, and if you are entitled to compensation then you naturally would subrogate or turn over your rights against the HC&D Company and the dairy truck owner, if there were any rights, to the Contractors, PNAB, and the insurance carrier.

Is it your intention to go ahead under the compensation law?

Mr. McClees: Well, I feel I should be entitled to that because I was going to work, riding to work, and was hurt.

Mr. White: It is not so much a matter——

Comm. Schmitz: It is up to you to decide which law you want to come under. If you come under the compensation law the matter can be heard and settled.

Mr. White: Under the compensation law you cannot [50] claim full wages; you can only claim up to twenty-five weeks, but against a third party you can show your loss in earnings as part of your damages; you can show your medical bills as part of your damages; you can show that you had a cer-

tain amount of pain and suffering as the result of it, and you can show that there may be permanent injuries for which you should be compensated. Then it becomes a matter for a jury to determine how much you should be awarded in damages, or if it is tried before a court without a jury—and there are no jury trials now, the court tries them now, then it would be up to the judge to determine what amount of money would adequately compensate you if they are liable to you. You will have to show that they are liable for your injuries.

Comm. Schmitz: I presume by filing this claim you intended to come under this law and let your employer and the insurer worry about the HC&D Company and the dairy truck owner, is that it?

Mr. McClees: That is the way I—

Comm. Schmitz: That is the way you want it?

Mr. McClees: Yes.

Comm. Schmitz: All right, we will go ahead with it then. Will you stand and be sworn? [51]

LELAND TIMOTHY McCLEES,

claimant herein, being first duly sworn, testified as follows:

Direct Examination

By Comm. Schmitz:

Q. What is your full name?

A. Leland Timothy McClees.

Q. Where do you live? A. Now?

(Testimony of Leland Timothy McClees.)

Q. Yes, now.

A. I live out at Lanakai, Box 83.

Q. What is your mainland address?

A. Cokato, Minnesota.

Q. For whom do you work? A. Now?

Q. Yes.

Q. (By Mr. White): Excuse me a minute.
What is this Free South?

A. That is where I stayed just before I came over here. My brother is there. My home is in Minnesota though.

Q. (By Comm. Schmitz) Who do you work for?

A. Out here now?

A. Yes. A. The Navy Contractors.

Q. Contractors, PNAB? A. Yes. [52]

Q. Were you working for them on April 17, 1942?

A. I was going to work; I was not working.

Q. You were on the payroll on that day?

A. Yes.

Q. When did you start to work for Contractors, PNAB?

A. January. I will swear now I don't know just when.

Q. January, 1942; that is close enough.

A. It was in January. I got over here the seventeenth; I think it was around the twentieth or twenty-second.

Q. Where was the location of your work?

A. I was a truck driver.

(Testimony of Leland Timothy McClees.)

Q. Truck driver? A. Yes.

Q. Where on the island were you working?

A. I was traveling all over the island; I was driving a dump truck.

Q. Where were you working out of?

A. What?

Q. Were you working out of a motor pool? Driving the dump truck, where did you haul from and where did you haul to?

Q. (By Mr. White) What job did you haul for?

A. Well, I hauled from there to a quarry.

Q. What job; whereabouts on the island was the job located? The job that you worked on.

Q. (By Comm. Schmitz) Were you working at Kahuku? A. Kaneohe. [53]

Q. Kaneohe? A. Yes.

Q. When you worked at Kaneohe did you live out there; did they have a camp there?

A. They just recently got one out there.

Q. Were you required to live in that camp?

A. Yes.

Q. How long had you been living in the camp before the accident? A. About six days.

Q. About six days? A. Yes.

Q. Prior to the time that you lived in the camp, where did you live? A. Contractors Hotel.

Q. Is that in Honolulu? A. Yes.

Q. Out on North King Street? A. Yes.

Q. When you lived at the Contractors Hotel on

(Testimony of Leland Timothy McClees.)

North King Street how did you get to your job at Kaneohe? A. HC&D trucks.

Q. You will have to speak louder.

A. HC&D trucks.

Q. Where would you go to get that transportation? Would [54] the trucks come to the hotel?

A. They would come to the hotel. That is right.

Q. Would you know which truck was assigned for the Kaneohe group; did they have identification marks?

A. They had two trucks that came there.

Q. You knew which one to get on?

A. Yes, I knew which one to get on.

Q. Was it always the same truck?

A. Same truck. I rode the same truck all the time.

Q. Same driver, same truck?

A. Same driver.

Q. When you went out to Kaneohe to live in the camp, about six days before the accident, then it was not necessary for you to have transportation; you were on the job, is that it?

A. Yes. They furnish transportation out there on their own trucks.

Q. They furnish transportation? A. Yes.

Q. How far from the camp to your job would it be? A. I imagine it is about a mile.

Q. Will you tell us now what happened on April 17, 1942? Describe the accident; tell us in your own words about it.

(Testimony of Leland Timothy McClees.)

A. Well, as far as I know, all I know, I was just sitting there and just all of a sudden it went like that—bang. [55]

Q. Did the truck turn over or were you struck by the other car?

A. I was struck by the iron bar on the truck, on the HC&D truck; an iron bar covers the truck entirely.

Q. Did the HC&D truck turn over?

A. No.

Q. Or did it run off the road?

A. No, it didn't tip over at all. It hit like that. I was just sitting there unconcerned.

Q. Now will you tell us how you happened to be on that truck rather than at the Kaneohe camp?

A. Well, I was in town on business and I stayed over night.

Q. Did you go to the Contractors Hotel to get the truck or did you meet it somewhere else?

A. Yes, I picked it up there where I stayed, at this friend's house.

Q. Then after you were struck by this iron bar, what happened? Were you taken back to Honolulu?

A. I was taken down here to the Emergency Hospital first.

Q. On Nuuanu Street?

A. It is down here somewhere. I don't know just where it is located.

Q. City and County Emergency Hospital, Punchbowl Street?

(Testimony of Leland Timothy McClees.)

A. Yes, City and County of Honolulu.

Q. What happened after that? [56]

A. From there they took me to St. Francis Hospital.

Q. You are now under the care of a doctor?

A. Dr. Cooper.

Q. Dr. Cooper? A. Yes.

Q. Have you received any compensation as yet?

A. I haven't had anything yet.

Comm. Schmitz: Your witness.

Cross Examination

By Mr. White:

Q. Leland, you have worked out at the Kaneohe job since about January 20, 1942?

A. I got over here the seventeenth and it was three or four days later.

Q. You came over as a laborer?

A. That is right.

Q. At how much a month? A. \$120.

Q. Then when were you raised to \$225; how long had you been here when you got the truck driver's job?

A. Just about a month when I got \$225.

Q. Sometime in February? A. Yes.

Q. Did you work all of the time at Kaneohe Station? A. All the time. [57]

Q. And up until six days before you were injured you had lived at the Kam Hotel?

A. Before.

Q. Before? A. Yes.

(Testimony of Leland Timothy McClees.)

Q. And then you were transferred to the Bird Farm camp, about one mile from the Kaneohe job?

A. That is right.

Q. In your truck driving operations at Kaneohe did you leave the Kaneohe reservation and go to some other point?

A. With the truck?

Q. With the truck.

A. No, I didn't.

Q. It was all right on the reservation?

A. It was all right on the reservation.

Q. What were your regular hours of work?

A. Eight to nine hours.

Q. Between what hours in the day; when did you start?

A. Seven in the morning.

Q. Seven in the morning?

A. Yes, to 4:30 in the afternoon.

Q. Quit at 4:30?

A. Yes.

Q. Did you work any overtime?

A. Yes. That is nine hours *and our* overtime. [58]

Q. Where was your truck kept with reference to the Kaneohe job?

A. Parked right on the lot.

Q. Parked right on the lot.

A. They have got a parking lot there and it is parked right on the lot.

Q. Do you take your meals at the Bird Farm camp?

A. I ate breakfast there. Instead of going out there I always ate down at the canteen.

Q. Did you go back there for lunch?

(Testimony of Leland Timothy McClees.)

A. No. I ate at the canteen.

Q. In the Navy?

A. In the Navy reservation, yes.

Q. Station. Where did you eat dinner? Where would you eat dinner or your supper?

A. I would eat it out there once in a while at the Bird Farm.

Q. At the Bird Farm? A. Yes.

Q. Did you have a day off on April 16 or did you take a day off, or what? A. Yes.

Q. Did you come into Honolulu? A. Yes.

Q. What time of the day did you come in? [59]

A. It was right around noon.

Q. Did you have a dentist appointment?

A. Well, I didn't have any appointment; I just came in to see about one.

Q. Did you go to see the dentist?

A. No, I didn't; he was busy.

Q. How did you spend the rest of the day, Mr. McClees?

A. Well, I met my brother; he is in the Navy here.

Q. In the Navy? A. Yes.

Q. I think you said that you spent the night at a friend's house? A. Yes.

Q. Where is that house located?

A. Out on River Road; it is at King Street.

Q. On South King Street or North King Street?

Q. (By Comm. Schmitz) North King and River? A. I think it is River.

(Testimony of Leland Timothy McClees.)

Q. Is it down near the Contractors Hotel or closer to town?

A. It is straight out—No, it is——

Q. Down by the Kalihi Stream?

A. Up King Street. Just about a block off of King Street, I guess.

Q. (By Mr. White) What was the name of your friend? A. What? [60]

Q. What was the name of your friend?

A. Martha Harding.

Q. Martha Harding? A. Yes.

Q. Is she also employed by the Contractors?

A. Yes, sir.

Q. At Kaneohe? A. Yes, sir.

Q. Mr. McClees, so far as your trip to Honolulu was concerned, that was entirely personal business, wasn't it? A. Yes, sir.

Q. You knew that there would be an HC&D truck carrying Contractors' employees pass by the stop where you got it? A. Yes, sir.

Q. You simply got on the truck?

A. Yes.

Q. You didn't pay any fare? A. No.

Q. Or ask anybody's permission to ride?

A. No.

Q. You say it was the same truck driver?

A. Same truck driver that always—same guy that always drove and picked us up at Kam School.

Q. Did he know you well enough to recognize you when he saw you? [61]

(Testimony of Leland Timothy McClees.)

A. Yes. Absolutely.

Q. He didn't raise any objection to you getting on the truck?

A. No, he didn't. He didn't say anything.

Q. Do you know what he does during the day?

A. Carpenter.

Q. Carpenter? A. Yes.

Q. Do you know whether or not he is an employee of Honolulu Construction and Draying Company, with reference to his truck driving, or an employee of the Contractors?

A. I don't know exactly. He lives over here.

(A discussion was had off the record.)

Q. (By Mr. White) Do you have any idea whether he was there or not?

A. I couldn't say. I don't know. That I don't know.

Comm. Schmitz: Couldn't we cover that point by getting a letter from the HC&D Company or from Contractors, PNAB, and include it in the record as an exhibit?

A. I know that he is paid for driving the truck by the Contractors.

Q. (By Mr. White) How do you know that?

A. Well, I heard him say so; that they get a dollar an hour.

Mr. White: As a matter of fact, he is not paid by the [62] Contractors for driving the truck; he is paid by HC&D as part of their rental agreement. But I can get a letter.

(Testimony of Leland Timothy McClees.)

Comm. Schmitz: That is probably a method of bookkeeping. Maybe the man himself doesn't understand it.

Mr. White: No. It is extra pay that they get from HC&D. They understand it.

Q. (By Mr. White) Did you have any companions with you on this trip to Honolulu; did you come over alone? A. I came over alone.

Q. And spent from noon until late afternoon with your brother and then went out to Miss Harding's house? A. Yes.

Q. Did your brother go with you?

A. No, he didn't.

Q. Was Mrs. Harding on the truck?

A. When it happened?

Q. When it happened. A. Yes.

Q. I believe it is true, Leland, isn't it, that at the time the accident happened you had your left arm, the arm that was injured, around someone's shoulder?

A. Just resting on her shoulder. The truck was crowded. My elbow was right by the bar, but it wasn't out over the side at all.

Q. All you contend is that you had been to Honolulu on personal business? [63]

A. Yes.

Q. And at the time the accident happened you were returning to the job? A. That is right.

Q. If it had not been for your personal trip to Honolulu you would have stayed at the Bird Farm that night? A. That is right.

(Testimony of Leland Timothy McClees.)

Q. And would have been given transportation from the Bird Farm to the job?

A. That is right.

Q. You were absent from the job on the sixteenth all day? A. That is right.

Q. Did you work on April 15?

A. No, I didn't.

Q. What did you do on April 15?

A. I was in and got some clothes; I had some laundry.

Q. Came into Honolulu?

A. Yes, sir. I didn't have all my stuff out there.

Q. Did you stay in Honolulu on the night of the fifteenth? A. Yes.

Q. Then actually you came over on the fifteenth?

A. Yes, that is right.

Q. And stayed two days?

A. Yes, that is right.

Q. Did you stay at Mrs. Harding's house on the night of the [64] fifteenth and the sixteenth?

A. Yes.

Mr. White: I think that is all.

Redirect Examination

By Comm. Schmitz:

Q. Mr. McClees, you say that *you at* the Kaneohe camp about six days before the accident. That would put you starting there on April 11 or 12?

A. Yes.

Q. Now when you went to work there were you told that you would be required to remain on the

(Testimony of Leland Timothy McClees.)

job all the time, seven days a week, or was there an arrangement for a day off each week?

A. Well, I had to ask the foreman for a day off.

Q. In other words, you worked seven days a week regular and they left it up to you, if you want a day off you ask the foreman for it?

A. Yes, you ask the foreman if you want a day off.

Q. Did you consult your foreman before you left the job on April 15?

A. Yes, I did.

Q. Did he give you permission to remain absent from work for a couple of days?

A. No, he didn't; not for two days he didn't.

Q. He gave you permission to remain absent for one day? [65] A. Yes.

Q. That was April 15? A. Yes.

Q. Did you go back to Kaneohe on the morning of April 16? A. No, I didn't.

Q. You remained in town? A. Yes.

Q. Is there any rule out there against taking a day off without permission?

A. Well, not only since this came in effect afterwards. Take two days off in a row, they fine you.

Q. If you take two days off in a row they fine you?

A. That has come in effect afterwards.

Q. That was made a rule after your accident?

A. That was after my accident.

(Testimony of Leland Timothy McClees.)

Q. On April 16, when you decided to remain in for another day, did you telephone your foreman?

A. No.

Q. Or take any steps to notify him?

A. No, sir.

Q. These trucks that take men from the Contractors Hotel out to Kaneohe, do they still take employees from the Contractors Hotel even though there is a camp at Kaneohe?

A. They still drive up there.

Q. There are still other men who come from the Contractors [66] Hotel to Kaneohe?

A. Yes, sir.

Q. This driver, you say, knew you?

A. Yes.

Q. And when you were waiting on the street for transportation he recognized you; did he stop voluntarily?

A. I talked to him. That is where he stops and picks up passengers.

Q. Did he talk to you?

A. Sure. He said, "Good morning."

Q. Did he ask you how you happened to be in town?

A. No; he didn't ask me no questions at all.

Q. Do they charge you for transportation?

A. No, sir; the transportation is furnished.

Q. Furnished free? A. Yes, sir.

Q. Now on the morning of the fifteenth, that is, when you came to Honolulu?

A. That is right.

(Testimony of Leland Timothy McClees.)

Q. Did you come to Honolulu by truck or by bus?

A. I came on the Navy truck out there.

Q. You came on the Navy truck? A. Yes.

Q. Contractors' truck?

A. Yes. I rode in with one of the fellows. [67]

Q. (By Mr. White) You said a Navy truck. Was it a Navy truck or Contractors' truck?

A. It is a Contractors' truck.

Q. (By Comm. Schmitz) One of those that has a sign on it, Navy Yard 50 and 41-73?

A. Yes.

Q. Is it possible to come away from that job and to go to that job by obtaining transportation on public conveyances; that is, are there any street-cars or busses running out there?

A. There is busses.

Q. There are busses that run out there?

A. Yes.

Q. Regularly? A. Yes, sir.

Q. I mean if you were in Honolulu and you wanted to get out to the job by seven o'clock in the morning.

A. You can take taxicabs or busses, transit busses.

Q. You could do that? A. Yes, sir.

Q. What is the bus fare?

A. Fifty cents. Taxicabs are more.

Q. This trip that you made to Kaneohe on the morning of April 16; that was for the purpose of returning to work?

(Testimony of Leland Timothy McClees.)

A. That was on the morning of April 17.

Q. April 17? [68]

A. Yes, sir, I was going to work.

Q. It was for no other purpose but that?

A. That is right.

Q. However, the trip into Honolulu on the fifteenth was for your own personal pleasure?

A. Yes, sir, that is right.

Q. Is there a rule by the Contractors that would require the men to obtain their own transportation by taxicab or bus from Honolulu to the job when they actually live out at Kaneohe and are visiting in Honolulu?

A. You have got to furnish your own transportation then; it is up to you, yes.

Q. In other words, I don't know whether I make myself clear to you, the men who live at the Contractors Hotel and are required to work in Kaneohe, they are given transportation by these trucks?

A. Yes, sir.

Q. However, the men who are living in Kaneohe ordinarily would not require that transportation—they are out there?

A. Sure.

Q. If they come to town, is there any rule that requires them to go back there by company truck or may they do as they see fit, or are they required to use public conveyances?

A. Well, you can do as you wish. You are not compelled to ride the trucks. You can take the bus or ride the trucks, [69] whichever you see fit.

Q. Are the drivers on these trucks required to

(Testimony of Leland Timothy McClees.)

stop on the street and pick up men who are living at Kaneohe?

Mr. White: If he knows what the rule is, let him state it. If he doesn't know, he cannot very well answer that, however.

Comm. Schmitz: He answered the other question. Would you read the first question?

Mr. White: He gave his personal opinion, but he didn't state whether there is any rule.

Q. (By Mr. White) Do you know whether there are any rules?

A. I don't know if there is any rule at all. No, I don't.

Comm. Schmitz: Mr. Cowart, will you go back there and read that testimony?

(The record was read by the reporter.)

Q. (By Mr. White) Leland, if you decided not to live at the Bird Farm camp or at the Kam Hotel, but decided to take an apartment in Waikiki, you would have to furnish your own transportation to and from work? A. That is right.

Q. Is that right? A. That is right.

Q. (By Comm. Schmitz) But if you lived at Kaneohe and came into town for a day off, then it is a matter of choice, you can furnish your own transportation or you can ride into [70] town on a company truck and back to the job on a company truck, if one is available?

A. Yes, that is right.

(Testimony of Leland Timothy McClees.)

Q. There are no rules by your employer that state otherwise?

A. I have never heard of no rules. They have never said anything—that you couldn't ride on them.

Q. (By Mr. White) So far you have been getting free transportation? A. Yes, sir.

Comm. Schmitz: Anything further?

Mr. White: No, I think that is all.

Mr. McClees: Do you want to read this letter?

Q. (By Mr. White) This is the letter from Dr. Cooper? A. Yes; that is right.

Comm. Schmitz: Do you have any other evidence to offer, Mr. White, regarding the attitude of the company with respect to furnishing transportation?

Mr. White: No. I don't think that is relevant at all. Mr. McClees admits that he was on a personal mission and was returning from that to the place of his employment.

There is one more question I would like to ask Mr. McClees.

Recross-Examination

Q. (By Mr. White) How were you dressed?

[71]

A. My work clothes.

Q. In your work clothes?

A. That is right.

Q. So you would not have had to stop at the Bird Farm camp that morning?

(Testimony of Leland Timothy McClees.)

A. No. I had my work clothes on. They are still out at the hospital.

Mr. White: That is all.

Comm. Schmitz: What is your pleasure?

Mr. White: The employer and insurer move that the claim be denied on the ground that the injury did not occur in the course of or arising out of his employment.

Comm. Schmitz: I feel in this case—It is true that he was on a personal mission on his way in, but he was on a job on his way out, and if the employer had specific rules prohibiting men from the use of company conveyances when they were in town——

Mr. White: This was not a company conveyance, Mr. Schmitz. It was a conveyance hired by the Contractors from and operated by an independent contractor.

Comm. Schmitz: For the purpose of bringing workmen to the job.

Mr. White: For the purpose of bringing workmen to the job. That is correct.

Comm. Schmitz: Do you deny that Mr. McClees' statement [72] is true when he says that men who are at work at Kaneohe may ride the trucks or public conveyances?

Mr. White: I construe that simply as Mr. McClees' personal opinion.

Comm. Schmitz: Are you able to controvert it? Are you able to disprove it?

Mr. White: No, the fact speaks for itself. He got a ride on a truck with a driver that he knew. Whether the driver knew that he no longer lived at the Kam Hotel or not, I don't know.

Comm. Schmitz: But what I mean, was this. If the company hasn't made any provision to prevent drivers from picking up men who do live——

Mr. White: Do you think they should?

Comm. Schmitz: It is not a matter for me to think one way or the other. I am asking you whether you want to bring anything specific on that point in the record. If you don't think it is necessary we will close the case on the record as it stands.

Mr. White: I don't think there is any evidence in the record now indicating one way or the other, whether or not there is a rule.

Comm. Schmitz: I think I am not making myself clear. I am asking you if you want an opportunity to bring such evidence to amplify the record. [73]

Mr. White: I don't think it is relevant to our contention that he was not in the course of his employment when the accident occurred.

Comm. Schmitz: I think the evidence will support a finding that claimant McClees was in the course of his employment on April 16 when he was returning to the job, and that he sustained personal injury by accident arising out of such employment. And I will, therefore, find an award in favor of the claimant. However, I would like to go further into the question of wages.

Will you stipulate to the wages as reported, at \$225 a month, or because of the shortness of the time in which he was employed do you want a further statement?

Mr. White: We will secure a wage statement on a man working 300 days or under.

Comm. Schmitz: The award will be delayed for that purpose. I suppose it will probably provide for the maximum compensation payment; it will be pretty close to it anyway, a truck driver's rate of pay.

Q. (By Mr. White) Seventy-five cents an hour?

A. That is what I was getting at the time I got injured. They raised it a couple of weeks afterwards.

Mr. White: That would be pretty close to the maximum.

Comm. Schmitz: All right. The hearing is closed.

(June 11, 1942, 10:55 A. M. The hearing was closed.) [74]

Territory of Hawaii,
First Judicial Circuit—ss.

I, Carey S. Cowart, certified shorthand reporter, do hereby certify that I reported in shorthand the testimony adduced and proceedings had on the hearing of the case of Leland T. McClees, claimant, versus Contractors, PNAB, before Andrew F. Schmitz, deputy commissioner, United States Em-

ployees' Compensation Commission; I further certify that the foregoing 30 pages is a full, true, and correct transcript of my shorthand notes taken as aforesaid.

Dated this 16th day of June, 1942.

(S) CAREY S. COWART,

Certified Shorthand Reporter. [75]

In the United States District Court for the
Territory of Hawaii

Civil No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al,
Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner
of the United States Employees' Compensation
Commission for the Pacific Compensation
District, and

LELAND T. McCLEES, claimant,
Defendants.

TRANSCRIPT

Of proceedings had in the above entitled cause, before the Hon. Delbert E. Metzger, Judge presiding, on October 8th and 24th, 1942; the Plaintiffs

appearing by J. P. Russell, Esq., of the law firm of Anderson, Wrenn & Jenks, and the Defendants being represented by Angus M. Taylor, Jr., United States Attorney.

October 8, 1942

10:04 a. m.

Mr. Taylor: Ready for the Government, Your Honor.

Mr. Russell: Ready for the plaintiffs, Your Honor; we represent the Liberty Mutual Insurance Company and the other plaintiffs.

The Court: This is a hearing on a Motion to Dismiss; to dismiss what?

Mr. Taylor: To dismiss the complaint previously filed; and may I make a statement at this time, if the Court [76] please. The Court has in its possession at the present time a certified copy of the transcript of record before the Deputy Commissioner Schmitz. It's my understanding that I might say that negotiations were had between Mr. Russell and a former assistant in my office Mrs. Gilbert, and I'd like at this time to offer into evidence and ask that it be made a part of the record this certified copy of the transcript of the original hearing with Mr. Schmitz presiding as Deputy Commissioner.

Mr. Russell: Well, Your Honor, may we have something to say on that. As I outlined to Mr. Taylor a few days ago we feel that the case is not yet at issue and therefore is not ready for what in effect amounts to a final hearing. In other

words, practically speaking we don't believe this transcript or this record of the hearing before the Deputy Commissioner should be made a part of the records or introduced before we're at issue; in other words before the Government has filed an answer either admitting or denying the facts alleged by us.

The Court: You regard this Motion to Dismiss as in the nature of a demurrer, is that it?

Mr. Russell: We regard it exactly as a demurrer, Your Honor; we have authorities to that effect, that the motion to dismiss is to be treated as a demurrer and is in effect a demurrer; and that brings us to the principal objection we have to the motion to dismiss; although grounds one and two are proper, ground three is not properly a part of the demurrer; ground three attempts to controvert the facts alleged in the petition and, as Your Honor well knows, it's probably one of the most well-established [77] principles in our law that you cannot controvert the facts on a demurrer, the facts are taken as admitted.

The Court: Yes. Well, I'm not familiar with your pleadings here; I haven't gone through them. Now, in the first instance, the complaint might have been filed by those who resisted a finding and order that was made by the commissioner.

Mr. Russell: That's right, Your Honor. The proceeding is in effect a proceeding under the Longshoremen's and Harborworkers Act; and that Act has been made applicable to certain defense

workers, and we're following the procedure set forth in the Longshoremen's and Harborworkers Act; that in itself is something new down here; we haven't had any case on that in a long time if at all; anyway, the situation is we filed a complaint, and under a very recent amendment of the Federal Rules of Procedure the Federal rules are made applicable to complaints of this nature, in proceedings of this kind, and under the Federal rules the proper way to attack defects of law is by motion to dismiss. The Government has filed a Motion to Dismiss, the first two grounds of which, as I say, are in effect a demurrer; the third ground, however, attacks the facts and in effect controverts the facts.

The Court: Well, that seems to me rather like an unusual procedure. Now, as I take it, there was a claim made against the employer and there was a hearing on that before the Commissioner.

Mr. Russell: Yes sir.

The Court: And this transcript that was referred to, that's a transcript of the proceedings in the hearing and the testimony and evidence there? [78]

Mr. Russell: Correct.

The Court: The commissioner then made a finding and an order in favor of the claim of the claimant. And now the next step then was the employer and insurance carrier coming into this Court with a complaint against that, which is in the nature of an appeal from the findings, is that it?

Mr. Russell: That's correct; it asks for an injunction staying the enforcement of the order and setting it aside, but it is an appeal, that's what it amounts to.

The Court: Now the Motion before the Court is to dismiss the appeal upon the ground that it isn't self-sustaining on the facts?

Mr. Russell: Correct.

The Court: Well, I think I've got a general outline of what it's about.

Mr. Russell: And we contend in effect that the third ground of this demurrer should be stricken because it does not admit the facts, and that is the office of a demurrer and is a well established rule applicable to demurrers that it must admit all of the facts pleaded in the petition.

The Court: Well now, that's the third point of the Motion?

Mr. Russell: Yes.

The Court (reading): "That it appears upon the face of the complaint and the record of the proceedings and testimony at the hearing before said Deputy Commissioner, referred to and made a part of said Complaint, that the findings of fact made by said Defendant Andrew R. Schmitz are based upon substantial and competent evidence."

[79]

Mr. Russell: You see, Your Honor, that is a denial of an allegation of our Complaint, namely, that any findings were not based upon substantial and competent evidence, that's the gist of our Com-

plaint; the Government has come in and denied that as a fact; that is properly embodied in an answer but not in a demurrer. I might say just preliminarily that we are skirmishing here upon a matter of procedure which in the final analysis is not terribly important, but this is the first case of this kind of several that will be before this Court and we wanted the Government to file an answer without that precedent set; I don't feel we can proceed to a final hearing, analysis of evidence and possibly introduction of further evidence before an answer by the Government; as for a motion to dismiss, that should be undertaken when the case is at issue.

Mr. Taylor: May it please the Court, I think if you'll examine the third ground of the Motion to Dismiss it will be apparent that it's not a denial of any facts; the facts are not taken up or discussed in any way; and I'd like to state this also, Your Honor, that a motion was filed and I have prepared here a voluminous brief on the matter to submit to Your Honor, and it was agreed between counsel that the matter would be submitted on memoranda of authorities for Your Honor's decision. Mr. Russell is quite correct when he tells Your Honor that he did mention the fact that he didn't particularly like my Motion to Dismiss being offered and there were several statements between counsel outside of court relative to the pleadings. I feel that the Motion is sound and that the Court should act on the Motion prior to any answer

by the Government. The Complainant here is asking Your Honor to act as a deputy [80] commissioner and try the case anew, which the overwhelming weight of authority frowns on; and if there was any evidence to substantiate the findings of this commissioner certainly his decision will be upheld. Now, I don't care to argue the case this morning; I prepared this brief which I intended to file this morning and serve Mr. Russell with a copy, and it was my understanding he was thoroughly familiar with that agreement and that it was satisfactory to him and after the briefs had been submitted if Your Honor desired to question counsel further we could appear and argue the case further or answer any questions or submit additional evidence if desired. I feel that that procedure should be followed, and that was what I was prepared to do this morning; the original copy of the brief is here to file this morning, and the additional copy will be in court in just a few minutes.

Mr. Russell: Your Honor, we're not quite as much at cross purposes as it appears. I agreed with counsel that we would submit it on briefs, and we are prepared to answer counsel's brief as soon as an answer is filed narrowing the issues. The whole purpose behind these Federal rules of procedure is to narrow the issues and get down to the issues before the court. We contend that the Government has jumped one stage in attempting to analyze the facts and the facts are not before the Court; there has been no answer to see which facts we plead are

admitted by the Government. It can simply be handled by the Court passing the Motion to Dismiss and requiring the Government to file an answer, and the briefs can be filed simultaneously as far as I'm concerned; I mean, we admit, Your Honor, that [81] at this particular hearing we're not going to bring any further evidence in and that the matter must be decided upon the evidence before the commissioner; therefore we're not asking for a trial; counsel is wrong in that statement.

The Court: Well, just what is the idea of you gentlemen, then, of the purpose of this supposed hearing this morning?

Mr. Russell: Well, I'm opposing the Motion to Dismiss, and under the rules the Court can pass decision upon the Motion to Dismiss until the final hearing. I'm asking that the Government be required to file an answer before it files a brief analyzing the facts and the evidence, because as yet there is no evidence before the Court.

The Court: Well, it kind of resolves itself just as a submission of this Motion to Dismiss with the trial of that issue to be had by way of briefs and later argued. At the present time you both concede, from anything that the Court has heard from either or both of you, the Court isn't in a position to act on it now; is that what you're telling the Court, that you want to brief the thing in argument and point out substantial reasons, such as they appear to counsel on both sides, as to the action the Court should take, that that's something to be done in the future?

Mr. Russell: Basically I think that's right, Your Honor, but I'm objecting to the procedure followed by the Government. In other words, they've brought in first a demurrer in which they deny the facts alleged in the petition; well, that cannot be done, for one thing; they have not filed any answer and they're asking for a final hearing without any answer being filed; those are the two [82] objections; those are purely formal procedure, but we're starting in on something new here and we ought to start in on the right form.

The Court: Well, my reaction is this: that the movant who says that the facts alleged in the complaint or any one issue, to entitle the plaintiff to relief sought or to any relief, should at this time present to the Court his argument and reasons on that and not just dump it in the lap of the Court to figure out whether that statement is correct or not by an examination not only of the complaint itself but as to the whole law surrounding it. Now you come in with a motion to dismiss the complaint on the first ground; are you ready with your arguments?

Mr. Taylor: Yes, Your Honor; I have prepared here a brief for Your Honor; I'm not prepared this morning to argue the case orally because it was my understanding with opposing counsel that I would submit this brief to you; I did know that he had some objection to the Motion, but there have been no formal objections made to the Motion except his informal statement that he does not like the way

we're proceeding; but in the brief Your Honor will find that I have attempted to clear up the whole situation. In opposing counsel's complaint, he refers on page 5 "that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to the said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit 'A' and incorporated in this Complaint by reference." Now, this award and the transcript of the testimony taken at that hearing on file is certainly evidence that should come before Your Honor in deciding this Motion; and I also [83] understood that that was agreed that that would be made a part of the record as referred to in the Complaint and also in the Motion to Dismiss; and as I understood this hearing this morning was to identify properly the certified copy of the transcript, to submit the brief which has been prepared by the Government and give Mr. Russell any reasonable time he'd like to answer and let Your Honor take any action he sees fit based upon the Motion to Dismiss, then after that I'm prepared to argue the matter.

Mr. Russell: I have no objection to any of that if the Government will file an answer before introducing evidence. We propose that we would introduce the record at the hearing; this is not a proper hearing to introduce outside evidence.

The Court: That is undoubtedly true. This is a motion to dismiss on the grounds of insufficiency in the complaint itself—

Mr. Russell (int.): Yes.

The Court: And while I think that you ought to be prepared and ready to point out to the Court at this time, still if you have between you agreed to submit that on briefs, if you think it's too voluminous to present orally to the Court, I'll entertain your briefs. Are they ready now?

Mr. Taylor: Yes, Your Honor, I'm ready to file mine with Your Honor this morning and serve Mr. Russell with a copy. Naturally he would not have an answer since he has not been served. This brief contains 19 pages and covers the situation fully, and this certainly is a proper time to file it. Whether Your Honor wants to rule on my motion to make the transcript a part of the record—it has been filed with the Clerk but it has not been made a part of [84] the pleadings.

The Court: I should doubt if it would be appropriate to bring in the transcript or any matter of evidence in it at this time, on the face of this motion and the nature of the motion as I construe it. I would say that the motion should be considered first, and then if we go to the issue of the merits, that's the time then to bring in the facts.

Mr. Taylor: Very well, Your Honor. I respectfully note an exception to Your Honor's ruling relative to the transcript; and the Government will file this brief with Your Honor this morning and serve Mr. Russell with a copy, and I think it will be sufficient, but if it's not Your Honor can say we'll set it down for a date certain for oral argument.

Mr. Russell: Your Honor, we can very simply do that if the Government will answer and the trial proceed in an orderly course. He can't very well file a brief on the facts until he has made an answer.

The Court: No; I don't want any brief on the facts; I want a brief pertaining to the Motion.

Mr. Taylor: Yes, Your Honor, that's what the brief is on, pertaining to the Motion; and the Government does not desire to answer at this time until action has been taken on the Motion.

Mr. Russell: Well, counsel has stated to the Court that the brief discusses the Motion to Dismiss. Our only recourse would be to strike the brief.

The Court: All right, if you think it should be struck, if you're of that mind and the nature of it is such you can act on that. I get the impression we're approaching the thing rather awkwardly. You're ready with your brief now, Mr. Taylor? [85]

Mr. Taylor: Yes, Your Honor.

The Court: And how much time do you think you want? If you had agreed to brief it I don't see why you couldn't brief this Motion without hearing what your adversary has to say in support of it; for that matter I don't see why——

Mr. Russell (int.): I can't do it for that reason, because counsel's brief discusses facts that are not in the Complaint.

The Court: Well, that I don't know.

Mr. Russell: Well, he has assured the Court that it does.

The Court: Well, how much time do you think you want?

Mr. Russell: Oh, I can do it in say ten days.

The Court: Well, 10 days would be to the 19th; is that all right—Monday the 19th of October?

Mr. Russell: Yes, that would be all right.

Mr. Taylor: Satisfactory with the Government, Your Honor.

The Court: Are you going to want an answering or reply brief?

Mr. Taylor: Well, I intend to file this brief this morning; whether Mr. Russell intends to answer this brief and also to brief that portion relative to his ideas on the Motion to Dismiss, I don't know.

The Court: All right; we won't go into that now, then. The Court will receive your brief at this time and give Mr. Russell and his clients 10 days to reply to that; and we'll see what develops by then; make it by noon of October 19th, Mr. Russell.

Mr. Russell: Very well.

(Adjourned—10:26 a. m.) [86]

October 24, 1942

10:30 a.m.

The Court: This is up on a Motion to Dismiss which was argued—

Mr. Taylor (int.): Yes, Your Honor.

The Court (continuing): And then submitted on briefs. The Court has listened to the argument—rather out of order—prior to reading the briefs; but

having carefully considered both matters is of the mind that the Motion to Dismiss should be denied, that the movant should be given reasonable time to answer to the Petition.

Mr. Taylor: May it please the Court, I'd like to respectfully except to Your Honor's ruling. I ask for one week to answer.

Mr. Russell: One week is agreeable to us.

The Court: Well, we had just as well make it—is Saturday week all right?

Mr. Taylor: All right, Your Honor.

The Court: That would be October 31st. When the answer is in——

Mr. Taylor (int.): The reason I asked for a week, Your Honor; ordinarily I'd say we would file the answer on Monday, but I don't think there are any further data or authorities to submit to Your Honor, and Mr. Russell and I have agreed that we would then submit the matter as previously agreed on the briefs already submitted, but there might be something he'd like to add or that I'd like to add.

The Court: Yes. Well, you were moving the other day to introduce the transcript of the evidence before the [87] Commissioner. That was deferred and will be until your answer is in.

Mr. Taylor: Yes, Your Honor.

The Court: Then that Motion will be entertained at any time; and I think I can say in advance that the matter will be allowed in.

Mr. Taylor: Very well, Your Honor.

The Court: Then when you get your answer in and we get the matter introduced in the record that seems appropriate, that's all.

Mr. Taylor: Yes, Your Honor.

Mr. Russell: Then it will be just submitted on the briefs previously filed.

The Court: I think I'll entertain it then, on the matter that is before me on the briefs; as to the merits of the main contention, there's one thing as I see it and that is the question as to whether the Commissioner was correct and had sufficient facts for his findings and conclusions in law that the injury resulted from and during the course of the man's employment.

Mr. Russell: That's the only issue, Your Honor; it's a comparatively simple case, I think.

The Court: Possibly.

Mr. Russell: Compared to a couple we have coming up.

The Court: Possibly.

I Hereby Certify the foregoing to be a full and accurate transcript of my shorthand notes taken in the above entitled cause.

/s/ OLAF OSWALD

Official Court Reporter [88]

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, October 8, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, of the firm of Anderson, Wrenn and Jenks, counsel for the plaintiff herein, and also came Mr. Angus M. Taylor, Jr., counsel for the defendant Andrew R. Schmitz.

This case was called for hearing on a motion to dismiss.

Mr. Taylor asked that the certification submitted by the defendant Schmitz be considered as a part of the record.

Mr. Russell made an objection to the acceptance of the certification in evidence. Mr. Russell stated that the motion to dismiss is a demurrer and made a statement as to the procedure to be followed and asked that the defendant file an answer.

Mr. Taylor made a statement as to the procedure and stated that he will have no evidence and will submit briefs.

The offer of the certification was denied at this time and an exception noted.

The brief for the defendant was submitted.

The plaintiffs were allowed to October 19, 1942 at 10 a.m. to file a reply brief. [89]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, October 24, 1942

[Title of District Court and Cause.]

On this day came Mr. Angus M. Taylor, Jr., Acting United States District Attorney, for the defendant Andrew R. Schmitz, and also came Mr. J. P. Russell of the firm Anderson, Wrenn & Jenks, counsel for the Liberty Mutual Insurance Co., and this case was called for hearing on Motion to Dismiss.

The Court denied the Motion to Dismiss. An exception was noted by Mr. Taylor. The Court ordered that the defendant have to October 31, 1942 within which to file an answer. [90]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, November 7, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, of the firm of Anderson, Wrenn & Jenks, counsel for the plaintiffs herein, and also came Mr. Angus M. Taylor, Jr., Acting United States Attorney, appearing for John C. Gray, who is at present Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District.

This case was called for hearing on a motion for default.

Mr. Russell and Mr. Taylor made statements.

The Court ordered that this matter be continued to Tuesday, November 10, 1942 at 10 a. m. [91]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, November 16, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, counsel for the plaintiff herein, and also came Mr. Angus M. Taylor, Jr., Acting United States Attorney, appearing for the defendant herein. This case was called for hearing on the offer of the certification and transcript in evidence.

On motion of Mr. Russell the certification and transcript was admitted in evidence as plaintiff's Exhibit No. 1, marked and ordered filed. [92]

In the United States District Court for the
Territory of Hawaii

Civil Action No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al.,

Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner
of the United States Employees' Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, claimant,
Defendant.

JUDGMENT

Pursuant to the written Findings and Conclusion
of this Court filed herein on the 24th day of No-
vember, 1942, and the Plaintiff having failed to
establish his right to the relief prayed for in the
Complaint filed herein on the 5th day of August,
1942,

It Is Hereby Ordered that the Complaint be and
the same is hereby dismissed.

Dated: Honolulu, T. H., this 29th day of De-
cember, 1942.

(Seal) (S) WM. F. THOMPSON, JR.,

Clerk, United States District
Court for the Territory of
Hawaii.

Let the foregoing judgment be entered:

(s) D. E. METZGER,

Judge, United States District Court for the Territory of Hawaii.

[Endorsed]: Filed Dec. 29, 1942. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Liberty Mutual Insurance Company, a Massachusetts corporation, one of the plaintiffs above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment dismissing the complaint in the above entitled action entered on December 29th, 1942.

Dated: Honolulu, T. H., December 30th, 1942.

ANDERSON, WRENN &
JENKS,

Attorneys for Plaintiffs above
named.

By (s) J. P. RUSSELL.

Received copy this 31st day of Dec. 1942.

(s) EDWARD A. TOWSE,

For: U. S. District Attorney.

[Endorsed]: Filed Jan. 2, 1943. [96]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Liberty Mutual Insurance Company, a Massachusetts corporation, as principal, and Royal Indemnity Company, a New York corporation, as surety, are held and firmly bound unto the above named defendants in the sum of \$250.00; to which payment well and truly to be made we bind ourselves and our respective successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of December, 1942.

Whereas, Liberty Mutual Insurance Company, one of the plaintiffs above named, has prosecuted its appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in said cause by the United States District Court for the District for the Territory of Hawaii on the 29th day of December, 1942, dismissing the complaint filed by the above named plaintiffs against the defendants. [98]

Now, Therefore, the condition of this obligation is such that if the above named plaintiff shall prosecute its appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judg-

ment is modified then this obligation to be void,
otherwise to remain in full force and effect.

LIBERTY MUTUAL INSUR-
ANCE COMPANY,

Principal.

By (s) CHARLES F. WHITE, JR.,

Its General Agent.

(Seal) ROYAL INDEMNITY COM-
PANY,

Surety.

By (s) WM. P. CRANDALL,

Attorney in Fact.

Approved as to Form and Sufficiency of Surety.

(s) EDWARD A. TOWSE,

For: U. S. District Attorney.

(s) D. E. METZGER,

Judge of the above entitled
Court.

[Endorsed]: Filed Jan. 2, 1943. [99]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated by and between the Lib-
erty Mutual Insurance Company, appellant, and
John C. Gray, appellee, through their respective at-
torneys, that the record on appeal shall consist of
the following:

1. Complaint and Summons, filed on August 5, 1942;
2. Motion to Dismiss, filed on September 30, 1942;
3. Stipulation for Substitution of Parties, filed October 31, 1942;
4. Answer of John C. Gray, Deputy Commissioner, filed October 31, 1942;
5. Motion for Default and Affidavit of Clerk, filed November 4, 1942;
6. Findings and Conclusion, filed November 24, 1942;
7. The following original Exhibits:
 - (a) Employer's report, Form 202, April 21, 1942;
 - (b) Notice that claim will be controverted, May 19, 1942; [101]
 - (c) Employee's Claim for Compensation, Form 203;
 - (d) Answer of Employer;
 - (e) Letter of Dr. J. W. Cooper, June 10, 1942;
 - (f) Copy of Award, July 8, 1942;
 - (g) Transcript of testimony before Deputy Commissioner;
8. Reporters' Transcript for October 8 and October 24, 1942 (in duplicate);
9. Clerk's minutes;
10. Judgment, December 29, 1942;
11. Copy of Notice of Appeal;
12. Copy of Bond;
13. Copy of this Stipulation.

Dated: Honolulu, T. H., December 31st, 1942.

LIBERTY MUTUAL INSUR-
ANCE COMPANY,

Appellant.

By ANDERSON, WRENN &
JENKS,

Its Attorneys.

By (s) J. P. RUSSELL.

JOHN C. GRAY,

Deputy Commissioner, Ap-
pellee.

By (s) EDWARD TOWSE,

For: U. S. District Attorney.

[Endorsed]: Filed Jan. 2, 1943. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD
ON APPEAL.

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 102 inclusive are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that

the costs of the foregoing transcript of record are \$36.25 and that said amount has been paid to me by the appellant.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said court this 20th day of January, A. D. 1943.

(Seal)

WM. F. THOMPSON, JR.,

Clerk, United States District
Court, Territory of Hawaii.

[103]

[Endorsed]: No. 10355. United States Circuit Court of Appeals for the Ninth Circuit. Liberty Mutual Insurance Company, a Massachusetts Corporation, Appellant, vs. John C. Gray, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed January 26, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10355

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts Corporation,

Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the Pacific Compensation District,
and LELAND T. McCLEES, Claimant,
Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Comes now the appellant above named and hereby designates the points on which it intends to rely upon on this appeal, as follows:

1. The Court erred in ordering the complaint dismissed inasmuch as the claimant's injuries did not arise from his employment nor were they incurred while he was acting within the scope or course of his employment.

2. The Court erred in refusing to grant a mandatory injunction restraining and enjoining defendants from enforcing said award of compensation and in refusing to reverse, annul and set aside same.

3. The Court erred in finding that the compensation order and award of compensation were in ac-

cordance with law, and in ordering dismissal of the complaint on that ground, inasmuch as the evidence fails to support the finding and judgment in this, that at the time he sustained his injuries the claimant was not at his place of employment, but was on a personal venture having no connection with his employment and was not acting in the course of his employment.

4. The finding and judgment are contrary to the evidence and contrary to law, inasmuch as the testimony shows without conflict that the accident in which the claimant was injured occurred off the employer's premises when the employee was riding in a conveyance selected by him and at a place selected by him and not by his employer, exposing himself to hazards not incident to his employment.

5. That the findings and judgment are contrary to the evidence and contrary to law inasmuch as the testimony shows that the accident in which the claimant was injured was not the result of any industrial risk, but arose from a common peril to which the public generally is exposed.

THEODORE HALE,

CARROLL B. CRAWFORD,

Attorneys for Appellant.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD NECESSARY FOR CON-
SIDERATION ON APPEAL.

Comes now the appellant above named and hereby designates as necessary for consideration on appeal the entire certified transcript of record on appeal in the above entitled matter, and hereby designates for the printed record on appeal said entire transcript of record.

THEODORE HALE,
CARROLL B. CRAWFORD,
Attorneys for Appellant.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF MAILING

State of California,
City and County of San Francisco—ss.

E. J. MacDonald being first duly sworn, deposes and says: That at all times herein mentioned her business address was and still is 111 Sutter Street, San Francisco, California; that at all times herein mentioned she was and still is a citizen of the United States and a resident of the City and County of San Francisco, State of California, over the age of eighteen years and not a party to the above entitled proceeding:

That on the 6th day of February, 1943, she deposited in the United States mail at San Fran-

cisco, State of California, a true copy of the annexed Appellant's Statement of Points To Be Relied Upon On Appeal and of Appellant's Designation of Parts of the Record Necessary for Consideration on Appeal, enclosed in a sealed envelope with postage fully prepaid, addressed to:

ANGUS M. TAYLOR, JR.,

United States Attorney, Dis-
trict of Hawaii, Honolulu,
T. H.

That there is delivery service and regular communication by mail between the said place of mailing and the place addressed.

E. J. MacDONALD.

Subscribed and sworn to before me this 6th day of February, 1943.

MARIE H. STANLEY,

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1943.

[Endorsed]: Filed Feb. 6, 1943. Paul P.
O'Brien, Clerk.